Is It Immoral to be Prudent?

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ABSTRACT: Some political commentators argue that "any proposal permitting or tolerating abortion"–what some have called imperfect or incremental legislation–"is intrinsically unjust." This claim disregards the long tradition of classical prudence developed by Aristotle and continued in the writings of Thomas Aquinas and Edmund Burke, among others. Classical prudence takes account of limitations in a world of constraints and strives to achieve that greatest measure of justice possible under the particular circumstances. It is not possible to say that "any proposal permitting or tolerating abortion is intrinsically unjust" without considering various factors, including the specific intent of the legislators, the particular language of the law, and–perhaps most importantly–the existing institutional, legal, social, and political constraints. While it is not possible to say, in the abstract, that any law permitting abortion is "intrinsically unjust," such a law may be prudent or imprudent in the particular circumstances.

I. INTRODUCTION

Determining how justly and effectively to eliminate or limit unjust laws and conditions is a timeless and universal dilemma in political life. As centralized forms of political society have declined in number, and political power has been decentralized through the rise of democratic governments since the 1600s, more political leaders have faced this challenge, because more have had a role in political decision-making. This challenge has recently played out in eastern European countries—like Poland, Germany, and the Czech Republic—since the collapse of the

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Soviet Union.

A famous example is the campaign against the slave trade in England. William Wilberforce mounted a nearly fifty-year effort between 1787 and 1833—most of that time as a member of Parliament—to abolish the slave trade throughout the British empire and, eventually, to emancipate the slaves. Throughout those long years, Wilberforce and his allies faced difficult ethical questions regarding the most effective way to end slavery and the slave trade. Should they first campaign against slavery, or the slave trade, or both? Periodically, they addressed parliamentary bills that would regulate the slave trade without prohibiting it or regulate the trade without regulating slavery itself. After a long fight, Wilberforce and his allies were successful: Parliament abolished the slave trade on March 25, 1807 and emancipated the slaves on July 26, 1833.

In seeking to overturn or limit unjust laws and conditions, what moral obligations do statesmen, like Wilberforce, have in deciding which goals to seek and which means (strategies and tactics) to pursue? Must they exclusively pursue the perfectly just in law? Was Wilberforce morally obliged to support only legislation that would completely prohibit slavery outright? Could he, as a means to the ultimate goal of abolition, propose legislation that would limit the evil (for example, by regulating it) without prohibiting it outright? What about those who assisted Wilberforce's campaign: citizens, lawyers, activists, aides? What moral obligations did they have in deciding such strategic and tactical questions? The object of this essay is to discern those moral obligations and the outline of appropriate practical reasoning within the particular context of modern democracy.

II. The Tradition of Prudential Moral Reasoning

In common parlance, this issue is usually framed as "accepting half a loaf" or being "willing to compromise" or "accepting the lesser evil." Because these colloquialisms are ethically imprecise, they are inadequate to help political leaders or activists deal with difficult strategic questions. A more thorough ethical analysis is needed.

In philosophical terms, this dilemma is typically framed as a problem of avoiding participation or "cooperation" in evil actions or

laws. But this incorporation of a concept applicable to personal moral probity may provide inadequate moral guidance to citizens or public officials unless there is first a consideration of the broader perspective of prudential moral reasoning and the contingencies of political decision-making.

In his 1995 encyclical, *Evangelium Vitae*, Pope John Paul II explains why limiting unjust laws and their evil effects does not involve illicit cooperation:

> [73.3] A particular problem of conscience can arise in cases where a legislative vote would be decisive for the passage of a more restrictive law, aimed at limiting the number of authorized abortions, in place of a more permissive law already passed or ready to be voted on.... When it is not possible to overturn or completely abrogate a pro-abortion law, an elected official whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at *limiting the harm* done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects.[1]

This ethical statement has been viewed by some as an innovation, and debate has ensued over the details of the statement and how strictly or broadly to construe it. This statement cannot be accurately understood, however, without understanding that it rests on a rich prudential tradition going back at least to Aristotle.[2] Understanding that tradition

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[1] Pope John Paul II, *The Gospel of Life* (*Evangelium Vitae*) §73, emphasis in original.

[2] See generally *Tempered Strength: Studies in the Nature and Scope of Prudential Leadership*, ed. Ethan Fishman (Lanham MD: Lexington Books, 2002).

gives a wider context to debates over the details of this statement and to the general question of avoiding participation in evil acts. And understanding the prudential tradition is necessary to discern differences between the individual's capacity and responsibility to avoid cooperation and the public official's.

A. Four Questions

This ethical tradition, focusing on the central element of prudence in political action, goes back to Aristotle and was incorporated into Christian ethics by Augustine in *The City of God*, with his doctrine of the Two Cities, the "first comprehensive statement on politics" by any church father.[3] In this tradition, prudence assumes moral ends, consistent with divine and natural law, and seeks wisdom in pursuing those ends, recognizing contingencies and obstacles to those ends. Prudential analysis recognizes the limits of what politics can achieve in the fallen world and emphasizes practical reasoning about contingencies and about the obstacles to achieving the greatest measure of justice (the good) possible in the fallen world. Prudence recognizes the different spheres of responsibility of the individual and the statesman charged with the responsibility for public order and justice. The *personal* obligations (and abilities) of the individual to resist *personal* moral violations are different from the obligations (and abilities) of the statesmen to maintain *public* order and justice.[4]

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[3] Robert P. Kraynak, *Christian Faith and Modern Democracy: God and Politics in the Fallen World* (Notre Dame IN: Univ. of Notre Dame Press, 2001), p. 66.

[4] Prudence, in this tradition, is not mere self-interest or advantage, as some modern philosophers construe it. See, e.g., David Gauthier, "Morality and Advantage," reprinted in *Twentieth Century Ethical Theory*, ed. Steven M. Cahn

and Joram G. Haber (Englewood Cliffs NJ: Prentice-Hall, 1995), p. 437.

The element of practical wisdom is critical. As soon as consideration is given in regard to what to *do* about an unjust condition or law, practical wisdom is necessarily invoked, because practical wisdom has to do with action. Aristotle said that practical wisdom is "the capacity of deliberating well about what is good and advantageous, ...calculating well with respect to some worthwhile end."[5] Practical wisdom is concerned with what is possible, because "no one deliberates about things that cannot be other than they are or about actions that he cannot possibly perform."[6] Thus, deliberating about ends and means is basic to ethical decision-making. As the Aristotelian scholar Harry Jaffa put it, "it is the essence of practical wisdom to adapt its judgments to differences in circumstances. The purpose of practical wisdom is always the same, and the wise statesman will act to achieve the greatest measure of justice that the world in which he is acting admits."[7]

The central role of prudence in political governance was followed by Thomas Aquinas, and continued in the writings of John Calvin and Martin Luther.[8] In addressing the broad question of the best political regime, Robert Kraynak has written: "Christianity does not derive political imperatives, either for or against democracy, from divine law but leaves them to prudence guided by a realistic view of man's fallen nature."[9]

> [T]he older theologians adopted a prudential approach because their view of politics was largely shaped by the Augustinian doctrine of the Two Cities—the distinction between the city of God and the earthly city. They did not think that the spiritual order of God directly determined the political order of the earthly city. Instead, they made their political

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[5] Aristotle, *Nicomachean Ethics*, Bk. VI, trans. M. Ostwald (Indianapolis IN: Bobbs-Merrill, 1962), p. 152.

[6] Ibid.

[7] Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates* (Garden City NY: Doubleday, 1958), p. 346.

[8] Kraynak, pp. 89-104.

[9] Kraynak, p. xv.

> judgments by using prudence, guided by natural law (the predominantly Catholic approach) or by a notion of the limited ends of the state in the sinful world (the predominantly Protestant approach).[10]

Drawing on this prudential tradition, Harry Jaffa summarized the elements of prudential reasoning for statesmen in *Crisis of the House Divided*, his classic, Aristotelian analysis of the Lincoln-Douglas debates of 1858:

[10] Kraynak, pp. 4-5.

> The problem of applying the moral judgment of history to a statesman requires...a fourfold criterion: first, is the goal a worthy one? second, does the statesman judge wisely as to what is and what is not within his power; third, are the means selected apt to produce the intended results; and fourth...does he say or do anything to hinder future statesman from more perfectly attaining his goal when altered conditions bring more of that goal within the range of possibility?"[11]

Jaffa's summary of prudential moral reasoning focuses on ends and means, highlights the wise use of power, recognizes the limitations of the fallen world and its constraints on political action, and emphasizes the possibility of future progress.

This prudential tradition in political reasoning must be distinguished from what Robert Kraynak identifies as a Kantian "politics of moral imperatives," which is derived from a "moral imperative of human dignity that extends spiritual precepts into the political realm without relying on prudence."[12] Kraynak emphasizes the difference between the spiritual realm and the temporal (earthly) realm. One example of this confusion is a Biblical exegesis that would apply the personal ethical constraints on the individual found in the Sermon on the Mount (*Matthew* ch. 5) to statesmen and civil government. This faulty exegesis is resolved by comparing *Romans* 12:14-21, which rejects a personal right of vengeance, with the immediately-following passage (*Romans* 13: 1-10), which explicitly provides that civil government is invested with the responsibility of establishing justice, including the punishment of wrongdoers. In contrast to the politics of moral imperatives, "[t]he aim of political prudence...is to achieve the best approximation of the temporal common good that is possible by balancing the competing

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[11] Jaffa, p. 370.

[12] Kraynak, pp. 4, 154, 166.

demands of civil peace and moral virtue in an imperfect world."[13]

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[13] Kraynak, p. 97.

Kraynak's distinction is complemented by Reinhold Neibuhr's distinction between the political dispositions he called idealism and realism: "'Realism' denotes the disposition to take all factors in a social and political situation, which offer resistance to established norms, into account, particularly the factors of self-interest and power."[14] Idealism is "characterized by a disposition to ignore or be indifferent to the forces in human life which offer resistance to universally valid ideals and norms." Idealists fail to take into account the full range of obstacles that limit free choice in choosing the good. They do not take account of the fact that options are limited. Prudential judgment necessarily considers the obstacles and limitations in the fallen world.

[14] R. Niebuhr, "Augustine's Political Realism" in *The City of God: A Collection of Critical Essays*, ed. Dorothy F. Donnelly (New York NY: Peter Lang, 1995).

The prudential tradition was formulated long before modern democracy was developed. While its essential elements are not altered by democracy, its application can be made more difficult in the context of a democratic society because of two major reasons. First, instead of prudence guiding the judgment of one ruler, power is widely diffused within democratic societies, sometimes explicitly mandated by a constitutional separation of powers or a federal system. Consequently, the constraints on what can be achieved may be many and complicated. Second, there are many independent, unregulated sources of cultural and political influence that are applied in agitating for changes in law and public policy in a modern, democratic society. Democracy is recognized by many across the political spectrum like Mary Ann Glendon, Aryeh Neier, and Jean Bethke Elshtain as a political regime that, by its intrinsic and unavoidable nature, tends toward moderating differences, inevitably producing moderated change; and this is itself a constraint on what can be achieved at any one time.[15] This is because the wide diffusion of power in a democracy produces a political spectrum, with strong interests (or factions) arrayed on either ends of the spectrum, and more disinterested or undecided voices in the middle (*Federalist* #10). This is so for virtually any political issue. Since power is diffused in a democracy, many points of influence must be harnessed to make a difference. Ultimate victory by a group or minority may only be achieved when national interests (often, non-moral interests) converge with the goals of the faction, and the faction is able to capitalize on this convergence. Consequently, contingent judgments are inevitable. This makes it more difficult to assess the questions posed by Jaffa. This structural understanding of democracy necessarily shapes prudential analysis of particular political goals and means.

B. Abortion in America

[15] See, e.g., Jean Bethke Elshtain, *Democracy on Trial* (New York NY: Basic Books, 1995), p. 62: "Western democracies are not going a good job of nurturing those democratic dispositions that encourage people to accept that they can't always get what they want and that some of what they seek in politics cannot be found there."

Many historical examples of prudential judgment in achieving political change are possible, for example, Wilberforce's fight against the slave trade and slavery in England, the fight against slavery in the United States, the campaign for civil rights in the United States. However, this essay will focus on the nationwide legalization of abortion in America by the U.S. Supreme Court in *Roe v. Wade*[16] in 1973. The Supreme Court issued a nationwide rule of abortion-on-demand that state and local governments (and officials) have either accepted or have been unable to overturn or defy. Ever since the Supreme Court's decision usurped state authority to prohibit abortion, public officials in Congress and the States have made efforts to restrict the abortion license as much as possible through many types of legislation—like parental consent and notice, informed consent, regulations on abortion clinics, and partial-birth abortion legislation.

Various terms have been used to refer to this tension in strategic deliberation: legislative compromise, gradualism, or incrementalism. These labels are misleading insofar as they suggest small, gradual, unconstrained steps; the reality is mostly regulations at the margins imposed by political and legal constraints. Others use the term "imperfect legislation." These legislative measures *seek to limit abortion when it is not possible—socially, legally, politically, or physically—to ban it absolutely*. Given the constitutional and political obstacles imposed by the Supreme Court in *Roe v. Wade,* however, this legislation is both morally appropriate and strategically necessary. Jaffa's calculus looks at four factors: worthy goals, wise judgment as to what is possible, choosing effective means, and avoiding future preclusion of improvements. In analyzing these questions, one must also consider three

[16] 410 U.S. 113 (1973), with the companion decision in *Doe v. Bolton*, 410 U.S. 179 (1973).

factors: intention, context, and perception.

1. Worthy Goals

When it is not possible to eliminate completely an unjust law or condition, due consideration must be given to controlling the evil or limiting the evil effects, keeping in mind the ultimate goal and how limiting the evil aspects in the short-term may affect the ultimate goal over the long-term. "Imperfect legislation"—which limits abortion without absolutely banning it—is morally appropriate because it seeks to limit the evil of abortion. Such legislation is also strategically necessary to achieve positive change in law and culture.

Goals reflect one's intent. The intent of such imperfect legislation is not to endorse abortion or *Roe v. Wade*, but to limit its evil effect. Imperfect legislation may have one or more purposes. Some bills seek to protect principles (like parental authority or informed consent) that can still be protected despite *Roe*. Some seek to "limit the evil" by limiting the number of abortions as much as possible. And some seek to "push the outside of the envelope" and limit abortions in new ways that will challenge the authority of *Roe* in the courts. Generally, these bills seek to prohibit as much as possible, to erect barriers or fences.

There is a critical distinction between *authority* and mere *power*. These state regulations recognize the *power* of *Roe* without endorsing it. Legislation that admits certain limitations (or exceptions) in recognition of the existence of a countervailing legal power does not concede the "authority" of that power any more than a woman raped at the point of a gun recognizes the "authority" of the rapist. By "limiting the harm done" or "lessening the negative consequences," we do not admit or support the rest of the evil that we do not have the power (legal, political, or social) to touch now.

2. Wise Judgment Regarding What Is Achievable

An all-or-nothing approach in a democratic society is almost always futile for two primary reasons. First, in a democratic society, there is a wide spectrum of views that are voiced in the legislative arena. Legislative outcomes lean toward the middle, and voices at either end of the spectrum usually do not command majority support. Second, most

people oppose dramatic change but can be open to change a little at a time.

As a practical matter, an all-or-nothing approach means abandoning the legislative arena and any effort to make positive change in the law. It has no chance of garnering majority support and thus no chance of getting hearings or provoking debate. Imperfect legislation, in contrast, raises pointed issues in the state legislatures and requires legislators to debate real issues and stand up on real votes. And this is all done with the recognition that imperfect legislation seeks to limit the abortion license to the greatest extent possible.

Imperfect legislation can be called the all-or-something approach. Incremental legislation recognizes the nature of policy-making in a democratic society and the way that virtually all change is made. The notion that exceptions (legislation that does not ban abortion completely) are always immoral implies that real political and legal obstacles are to be ignored because the constraints draw a political actor into "violating principle." This moral framework is incorrect. Unfortunately, that erroneous moral framework means that pro-life political actors cannot work effectively in the American policy process, where, by the design of a federal structure and the separation of powers, progress comes, if at all, by "incremental" steps.

In a democratic society—where political power is so diffused, freedom of speech is almost unlimited, and public opinion plays such a dominant role—advocating a new legal or policy change that so markedly contrasts with the status quo of abortion-on-demand in every state creates a stark contrast of absolutes—with a Grand Canyon in between—and no means of bridging that gap in public discourse. It presents the stark proposition of all-or-nothing. And when the public is comfortable with the status quo, there are no effective means or symbols of persuasion to bring them over to the other side of the divide and cast a vote for what would likely be viewed as the opposite of the status quo. Thus, change rarely comes in through revolutionary means; it usually is reached as a culmination of an improving legal and sociological process, not as a reversal.

Even if the federal courts did not stand in the way of enacting abortion prohibitions without exceptions, the current national climate of

abortion-on-demand is the least favorable environment in which to argue for a rule against any exceptions. A policy of no exceptions is least likely achieved by starting from a climate of abortion-on-demand. Public policy reform is about change, and just as most people are hesitant about drastic change in their personal lives, most people are hesitant about drastic public policy changes. Thus, change comes, if at all, in small steps, little by little.

Therefore, exceptions are best disputed when abortion for other reasons is already prohibited, not when abortion-on-demand is legal and hardly anyone can ever remember the time when any abortion prohibitions existed. Focusing on the injustice of rape and incest exceptions, for example, is best fought when abortion is otherwise prevented by law, and best fought by focusing exclusively on such exceptions and their reason for being.

That is the nature of public policy—drawing differences and focusing on those differences. Fighting over the broadest differences—urging the most drastic change from the status quo, all in one vote—is the least possible way to succeed. This is simply a recognition of how change comes about in a democratic society. Prudent political leaders must establish and pursue a vision of complete justice, of complete legal protection for human life. But, in the democratic process, they must pursue the ideal in such a way that progress is made and with the willingness to accept "something" when "all" is not achievable due to social, legal, or political obstacles beyond their control.

3. POWER

The Supreme Court's decision in *Roe* effectively stripped the states of the *power* to prohibit abortions. It is not simply a question of will but of countervailing power. Numerous efforts have been made in the past thirty years to mount a direct political and constitutional assault on *Roe v. Wade* and all have failed. Recently, Norma McCorvey (the original "Jane Roe") personally filed a motion to overturn the decision, it was immediately dismissed by the federal court, and the Supreme Court recently denied review of the case. Recognizing this power of *Roe*, the states began to pass abortion regulations that would at least limit

abortion. However, in order to go into effect and actually have some positive impact in limiting abortions, these regulations had to incorporate certain boundaries imposed by the Supreme Court. These legal boundaries establish the context for what is possible.

If state laws disregard those boundaries imposed by the Supreme Court, they will be quickly struck down by the federal courts, attorneys fees will have to be paid to the attorney for the abortion-plaintiffs, and the laws will never go into effect. Thus, all the efforts made in enacting the law will be both futile (the laws will never go into effect) and counterproductive (1) by having state funds paid to abortion attorneys as attorneys fees, (2) by subjecting pro-life legislators to ridicule and undermining their credibility and effectiveness, (3) by limiting their influence on future bills. So, there are two and only two alternatives: stay out of the legislative process and do nothing, or work within the legal and political constraints imposed by the Supreme Court. That is the obvious and necessary context in which such legislation is drafted, introduced, and voted on in the fifty states since 1973.

4. CONTEXT

Context also reflects one's intent. Nearly everyone is familiar with the phrase "taking it out of context." A phrase in a written text or an oral comment or a snapshot can be "taken out of context" and, for that reason, misunderstood. It is possible, for example, to take a snapshot of someone that does not accurately represent the full picture. Assessing a person's action or intent also needs to be made in the proper context.

This applies especially to the actions of public officials, in a democratic society, where their actions are nearly always constrained by surrounding circumstances. Those surrounding circumstances may include long history, parliamentary procedure, court decisions, current statutes, opposing parties, nuances in the text of a bill, and recent votes, among other things.

As legislation proposed in a democratic society, imperfect legislation also needs to be assessed in its proper context. In the very drafting of imperfect legislation, its language is often constrained—indeed *imposed*—by a court decision or a series of technical

court decisions. Limitations (or "exceptions") in abortion legislation since *Roe* are directly imposed by the federal (or state) courts.

This context is particularly important for passing legislation successfully—passing legislation that will be allowed to go into effect and make a difference, and for enabling pro-life state legislators to be credible, effective, and successful. If a legislator introduces a bill that is not properly drafted—with due consideration to court decisions and current law—it will not be enacted, or it may be passed but struck down by a court and never allowed to go into effect. If struck down by a court, court costs, fees and penalties may be assessed against the state. All of these negative outcomes may negatively affect the ability of legislators to pass any future legislation.

5. PERCEPTION/SCANDAL

The nature of democratic society and a free press, combined with modern technology, make it particularly difficult to communicate clearly a statesman's purpose and to shape clear and accurate perceptions of a statesmen's conduct. In a different era and climate, Churchill expressed insight into the subtlety of "consistency" in the statesmen:

> ...a Statesman in contact with the moving current of events and anxious to keep the ship on an even keel and steer a steady course may lean all his weight now on one side and now on the other. His arguments in each case when contrasted can be shown to be not only very different in character, but contradictory in spirit and opposite in direction: yet his object will throughout have remained the same. His resolves, his wishes, his outlook may have been unchanged; his methods may be verbally irreconcilable. We cannot call this inconsistency. The only way a man can remain consistent amid changing circumstances is to change with them while

preserving the same dominating purpose.[17]

[17] Quoted in Jaffa at p. 46.

In the context of American law and abortion, the constraints of the courts are well-known. The purposes of imperfect legislation in the abortion context are publicly known. There is no mystery to this strategy.[18] No informed person could get the fair impression that such legislation endorses abortion. Exactly the opposite is true—such legislation is always attacked by abortion advocates as "just the first step in banning abortion." Still, public officials must strive to communicate their intentions. This, too, is part of prudence in political decision-making in a democratic society.

III. Avoiding Participation in Evil Actions and Laws

The tradition of prudential analysis promotes a richer understanding for evaluating the principle of participation or cooperation within the context of attempts to limit evil laws and conditions in a democracy. The ethical tension is due to the concern with participating in evil actions—either evil laws or evil conditions. The first principle of morality is to pursue the good and avoid evil. We are to individually turn from evil and do good. This includes an injunction against calculating to do evil in order that good may come. We must also avoid participating in the evil actions of others. The prudential tradition highlights the reality of obstacles and limitations in the fallen world.

This principle encompasses individual evil acts and enacting unjust laws. Public officials, especially legislators, do not work alone. They cannot enact a law alone or change existing law alone. They work within a group and seek to persuade a group to make a decision, seek an end, or secure a certain goal. But individuals must avoid participation in the action of others that promotes unjust conditions or laws.

The moral obligation of the legislator in a modern democracy is not different from that of one ruler in Augustine's day, but the context and constraints may be radically different. Although power is divided, the obligation of each is the same—to achieve the greatest measure of justice

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[18] For example, see Dennis J. Horan, Edward R. Grant & Paige C. Cunningham, *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* (Washington, D.C.: Georgetown Univ. Press, 1987).

possible in the particular circumstances. This includes an obligation not to promote or approve unjust laws, and a "grave and clear obligation to oppose unjust laws by conscientious objection."[19] But there is also an obligation to limit the evil effects of unjust laws. If a public official accepts the role of government service, he cannot responsibly take a position of neutrality or stand by idly, as though washing his hands of the situation.

COOPERATION

This dilemma—attempting to limit unjust laws while unable to prohibit or overturn them outright—is often framed as a question of "moral compromise." It is claimed that law must embody perfect justice, and that those who seek anything less are not just imprudent, or ineffective, but "compromisers" (suggesting a moral compromise). In other words, objectors start with the injunction of the moral law that the civil law must preclude homicide. Anything less is unjust, and acceptance of anything less is immoral. In the context of abortion (considered as homicide), nothing less than a complete legal ban on abortion is just. Any strategy or tactic must seek that complete ban. This is the politics of moral imperatives that ignores prudential judgment.

The answer to this objection is found by considering the principle of cooperation and the essential element of voluntariness, and it requires a careful evaluation of the practical constraints that legislators face working within a group.

When applied to personal behavior (that is, actions that are within an individual's personal control), it is common to refer to a direct ethical *violation* as a "compromise." "Compromise" assumes an even distribution of power between two sides who each "give up" something in order to achieve a settlement. The *Oxford English Dictionary* defines compromise as "[a] coming to terms, or arrangement of a dispute, by

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[19] John Paul II, cited in n1 above, at §7.

concessions on both sides; partial surrender of one's position, for the sake of coming to terms...." In its briefest definition, compromise is mutual concession. "Compromise" would not be considered accurate, however, when applied to a situation in which a person's will is overborne or vanquished by the will of other individuals or a group of individuals. Thus, it is not acceptable to refer to a woman raped by a man, or a group of soldiers who retreat in the face of a superior force, or a person who gives up his wallet at the point of a gun, as having "compromised."

Promoting or voting for legislation designed to limit the evil of abortion is not a question of illicit cooperation, formal or material.[20] Germain Grisez provides the following explanation:

> Cases of cooperation among equals usually pose no special problem. Both (or all) share the same purposes and do the same act together. Both (or all) have the same moral responsibility. Morally speaking, it is as if each were acting alone.
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> The classical problem of cooperation arises where people acting together are not really doing the same (moral) act, even though they are cooperating in the same (external) behavior. For example, when masters and slaves act together, the masters have purposes the slaves do not share, while the slaves are simply doing what they must to avoid punishment...
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> The relevant question here is: What is one willing? When one person cooperates in another's immoral action, the morality of the cooperator's deeds depends on his or her will...By formal cooperation, one person makes someone else's immoral action his or her own. A nurse formally cooperates with an abortion at which she is assisting if she wills it, wants it to happen, makes herself fully a party to it. But her action is material cooperation when she does things which help bring about the abortion without making the immoral act her own.
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> The difference is a matter not of feelings but of voluntariness. An intern may be disgusted by abortion, so firmly disapproving of it that she is sure she will never get one herself, yet take part in an abortion for the sake of completing her training. Since she does not meet the requirement unless the operation really does bring about an abortion, she very

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[20] Germain Grisez & Russell Shaw, *Fulfillment in Christ: A Summary of Christian Moral Principles* (Notre Dame IN: Univ. of Notre Dame Press, 1991), pp. 146-48.

reluctantly wills that the operation succeed. Her cooperation is formal. By contrast, a nurse may prepare patients for abortion and even hand over instruments during the operation, without choosing that the unborn be killed. Her cooperation is material.

But even material cooperation can be morally wrong, just as it can be wrong freely to accept bad side effects. If material cooperation would be unfair or give bad example, or if one has a responsibility to testify to the truth by avoiding even this much association with evil—then one should not cooperate materially.[21]

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[21] Grisez & Shaw, p. 147.

This analysis shows, I submit, why seeking to limit evil laws or their evil effects does not involve illicit cooperation, formal *or* material. There is no cooperation of equals. What is willed is key. The intent is to limit the evil effects. Confronting unjust laws necessarily requires contact or engagement but it does not mean participation, must less cooperation, with evil. By "limiting the harm done" or "lessening the negative consequences," we do not admit or support the rest of the evil that we do not have the power (legal or political) to touch now.[22]

VOLUNTARINESS

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[22] A number of religious leaders and moral philosophers and commentators have agreed with this general conclusion, if not the specific reasoning. See, e.g., John Finnis, "Helping Enact Unjust Laws Without Complicity in Injustice," *American Journal of Jurisprudence* 49 (2004): 11, 16 nn15-16, quoting the 1990 statement by Cardinal O'Connor; Anthony Fisher, "Some Problems of Conscience in Bio-Lawmaking" in *Culture of Life–Culture of Death: Proceedings of the International Conference on The Great Jubilee and the Culture of Life*, ed. Luke Gormally (London: Linacre Centre, 2002); Peter Bristow, *The Moral Dignity of Man*, 2nd ed. (Portland OR: Four Courts Press, 1997).

In evaluating the moral obligations of public officials, one must consider the ethical distinction between voluntary and involuntary action, what is chosen and what is accepted. As Aristotle points out in his *Nicomachean Ethics*, "actions done under constraint...are involuntary. An action is done under constraint when the initiative or source of motion comes from without."[23] The Scottish moral philosopher Thomas Reid, appealing to the same moral tradition, affirmed: "What is in no degree voluntary, can neither deserve moral approbation nor blame. What is done from unavoidable necessity...cannot be the object either of blame or moral approbation."[24] A correct moral understanding takes account of political and legal constraints and weighs countervailing power that limits moral action. "Injustice cannot be ascribed to involuntary actions."[25] This distinction is critical in evaluating the wisdom of legislative acts done to constrain an unjust law. When more powerful constitutional constraints limit what legislators can do, their action to limit the unjust law when they cannot overturn it must be seen to be involuntary and cannot be accounted as unjust or unethical. Here again, the context of legislative action is critical, because the legislative act must be viewed in the context of the constraints that surround and limit it.

Objections

In additional to cooperation, various other ethical objections have been raised against so-called "imperfect" legislation.

Utilitarianism. Although legislators seeking to limit the evil effects of unjust laws are concerned about producing results, that does not make them utilitarians or consequentialists. Realism is not utilitarian because it does not define the end as utility. Results (utility, consequences) are relevant, but they are relevant at the level of means rather than that of

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[23] Aristotle, *Nicomachean Ethics*,Bk III, 1110a (1962 edition cited above), p. 52.

[24] Thomas Reid, *Essays on the Active Powers of the Human Mind* (Cambridge MA: M.I.T. Press, 1969), p. 361.

[25] Grisez & Shaw, at pp. 101-02, 146.

defining ends, not in defining what is moral but in defining the effectiveness of the means.

Proportionalism. Seeking to limit the evil effects of unjust laws is not proportionalism, which involves "comparing the relative proportion of good and bad in the alternatives available in a situation of choice."[26] Rather, the intent is to limit the evil aspects.

Gradualism. Seeking to limit the evil effects of unjust laws is not gradualism, adopted because it is assumed that the public cannot accept higher ideals; instead, it involves limitations imposed by real obstacles.

Choosing the Lesser Evil. Seeking to limit the evil effects of unjust laws cannot be considered the "choosing of a lesser evil," because the context shows that options are very limited and what is possible is not a matter of choice but imposed by outside constraints.

Accepting Bad Side Effects. If one engages in material cooperation, he is responsible for bad side effects for evil acts that result. Given the constraints and the limited options, those who seek to limit the evil effects of unjust laws are not engaging in cooperation of any form, formal or material. They are not choosing an evil or "accepting" any side effects; their intent is to limit the evil law and those effects. None of these objections impugns the purposes of public officials who seek to limit the evil effects of unjust laws.

[26] Grisez & Shaw, at p. 60.

In a recently published book, Colin Harte argues that "any proposal permitting or tolerating abortion is intrinsically unjust."[27] While Harte raises good reasons why certain restrictive legislation might be *imprudent*, he does not successfully argue that *all* restrictive legislation is *intrinsically unjust* (i.e., unjust under all circumstances). Briefly, three flaws stand out. First, Harte misinterprets "intrinsically unjust" as that term is used in *Evangelium Vitae* §73.[28] Harte assumes that "intrinsically unjust" means unjust regardless of context and circumstances and the intentions of any acting person. The term refers to *permitting in principle*, rather than allowing to remain. *Evangelium Vitae*'s reference at §73 to a permissive law refers to a law that "admit[s] in principle the liceity of abortion" in the words of §22 of the 1974

[27] Colin Harte, *Changing Unjust Laws Justly* (Washington, D.C.: Catholic Univ. of America Press, 2005).

[28] As John Finnis points out, "'Intrinsically unjust' replaces the term 'intrinsically immoral' predicated of such laws in [§22 of] the Declaration on Procured Abortion made by the Congregation for the Doctrine of the Faith in November 1974. Neither term, as predicated of a kind of law, is traditional...." John Finnis, "Helping Enact Unjust Laws Without Complicity in Injustice," 49 *American Journal of Jurisprudence* 49 (2004): 11, 13 n6.

Declaration. Second, Harte focuses on the specific words of restrictive legislation, in isolation from context and from their impact or effect. Context is critical because it requires a comparison between existing law and any new bill or amendment. Third, Harte treats the action of any legislature as one action of one group, without regard to the conflicting intent of individual legislators or a minority of legislators.[29]

IV. Conclusion

It is not immoral to be prudent. A political leader or activist must have a healthy respect for constraints in the fallen world and an acute insight into their nature and effect. Even if a prudential framework is accepted for political decision-making—and assuming no cooperation in an evil

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[29] John Finnis has thoroughly critiqued Harte's position in a number of essays. See, e.g., John Finnis, "Helping Enact Unjust Laws Without Complicity in Injustice," *American Journal of Jurisprudence* 49 (2004): 11; John Finnis, "The Catholic Church and Public Policy Debates in Western Liberal Societies: The Basis and Limits of Intellectual Engagement" in *Issues for a Catholic Bioethic*, ed. Luke Gormally (London: Linacre Centre, 1999), pp. 261-73; John Finnis, "Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections," *Notre Dame Law Review* 71 (1996): 595.

act is involved—difficult strategic and tactical questions remain as a challenge to the conscientious statesman. He/she must evaluate the four questions posed by Jaffa—worthy goals, wise judgment as to what is possible, choosing effective means, and avoiding future preclusion of improvements—along with the subsidiary issues of context, intention, and perception. Political leaders must guard against being lured into cooperation and must keep the goal in mind and not get lost in the details of the means. Prudent political leaders must pursue a vision of complete justice, of complete legal protection for human life. But, in the democratic process, they must pursue the ideal in such a way that progress is made and with the willingness to accept "something" when "all" is not achievable because of social, legal, or political obstacles beyond their control.